

**THE HONOURABLE SRI JUSTICE A.V. SESA SAI**

**CIVIL REVISION PETITION No.5041 of 2014**

-

**ORDER:**

The respondents in I.A.No.315 of 2014 in A.S.No.52 of 2010 on the file of the Court of the I Additional District Judge, Karimnagar, are the petitioners in the present revision filed under Article 227 of the Constitution of India.

By virtue of an order dated 02.09.2014, the learned I Additional District Judge, Karimnagar, allowed I.A.No.315 of 2014 filed by the respondents herein under the provisions of Order XXVI Rule 9 of the Code of Civil Procedure (hereinafter called "the Code").

Heard Sri Jithender Rao Veeramalla, learned counsel for the petitioners, apart from perusing the material available before the Court. None appears for the respondents.

The facts and circumstances leading to the filing of the present revision are as under:

The petitioners herein instituted O.S.No.4 of 2008 on the file of the Court of the Senior Civil Judge, Sircilla, Karimnagar District, against the respondents herein for permanent injunction in respect of the suit schedule land, admeasuring 0.10 gts. including a room with tin roof bearing H.No.1-2-145/1 in Sy.No.862 of Ambikanagar, Sircilla Town and Mandal, Karimnagar District. The learned Senior Civil Judge decreed the suit on 22.07.2010, granting permanent injunction in favour of the plaintiffs/petitioners herein, restraining the defendants/respondents herein from interfering with the peaceful possession and enjoyment of the petitioners/plaintiffs over the plaint schedule property. Felt aggrieved by the said decree, the respondents herein preferred A.S.No.52 of 2010 on the file of the Court of the I

Additional District Judge, Karimnagar. In the said appeal suit, the respondents herein filed I.A.No.315 of 2014 under the provisions of Order XXVI Rule 9 of the Code, seeking appointment of Advocate Commissioner for the purpose of survey and fixation of boundaries of Sy.No.862 and to identify and locate the plots covered by the registered documents of the petitioners and the respondents. Resisting the said application, a counter-affidavit was filed. The learned

I Additional District Judge, Karimnagar, by virtue of an order dated 02.09.2014, allowed the said application, appointing Advocate Commissioner for the purpose of demarcating and locating the land of the petitioners and the respondents in Sy.No.862. Calling in question the validity and the legal sustainability of the said order passed by the learned I Additional District Judge, the present revision has been filed.

It is contended by the learned counsel for the plaintiffs/petitioners herein that the order under challenge is erroneous, contrary to law and opposed to the very spirit and object of the provisions of Order XXVI Rule 9 of the Code. It is further contended by the learned counsel that the learned Judge did not properly consider the averments in the counter and had the same been considered from proper perspective, the order under challenge would not have emanated. It is further contended by the learned counsel that the reasons assigned by the Court below for allowing the application are neither sustainable nor tenable and are not in consonance with the principles laid down in various pronouncements. It is also argued by the learned counsel that the learned District Judge grossly erred in entertaining the application, as the respondents herein filed the application when the appeal was coming up for arguments. It is also argued by the learned counsel that absolutely no reason is assigned by the respondents herein as to why they did not file the application under Order XXVI Rule 9 of the Code during the pendency of the suit.

To bolster his submissions and contentions, the learned counsel for the petitioners places reliance on the judgment in the case in **Penta Urmila and others v. Karukola Kumaraswamy and others**<sup>[1]</sup>.

In the above background, now the issues which this Court is called upon to answer in the present revision are:-

- 1) Whether the order passed by the Court below is in conformity with the provisions of Order XXVI Rule 9 of the Code, and
- 2) Whether the order passed by the Court below warrants any interference of this Court under Article 227 of the Constitution of India?

The material available before this Court vividly and candidly discloses that a suit, O.S.No.4 of 2008, instituted by the petitioners herein was decreed by the learned Senior Civil Judge, Sircilla, on 22.07.2010. In the said suit, plaintiff No.1 examined himself as P.W.1 and also examined P.Ws.2 and 3 on his behalf and marked Exs.A1 to A16 and on the other hand, defendant No.1 examined himself as D.W.1 and also examined D.Ws.2 to 6 on his behalf and marked Exs.B1 to B13. As against the said judgment and decree rendered by the trial Court, the respondents herein preferred A.S.No.52 of 2010 on the file of the Court of the I Additional District Judge, Karimnagar.

According to the petitioners herein, when the said appeal was coming up for arguments, the present application i.e. I.A.No.315 of 2014 was filed by the respondents herein under the provisions of Order XXVI Rule 9 of the Code. In the affidavit filed in support of I.A.No.315 of 2014, the respondents herein stated that the land in Sy.No.862 owned by their vendor is in vast extent of more than Ac.5.00 and the land of the plaintiffs is not the suit land, but they are falsely claiming the land of the defendants. While assigning the said reason as the sole and solitary reason, the respondents herein sought

appointment of Commissioner.

A perusal of the counter-affidavit filed on behalf of the plaintiffs/petitioners herein clearly shows that they emphatically opposed the appointment of the Commissioner and in the said counter, they narrated various aspects in elaboration, which, according to them, would disentitle the respondents herein from getting the relief in I.A.No.315 of 2014.

A perusal of the order under challenge manifestly discloses that the learned I Additional District Judge did not consider the averments made in the counter of the petitioners herein from proper perspective. In this connection, it would be highly relevant and appropriate to refer to the judgment cited by the learned counsel for the petitioners. In the case of **Penta Urmila** (1 supra), this Court, while dealing with the provisions of Order XXVI Rule 9 and Order XLI Rule 27 of the Code, at paragraph 6, held as under:

“In a suit for permanent injunction, the vital and important issue is whether the plaintiffs are in possession of the suit schedule land and whether there was attempt by the defendant/s to interfere with such possession of plaintiffs. The burden is entirely on the plaintiffs to bring convincing and cogent evidence on record and for so doing, it is not permissible for them to invoke Order XXVI Rule 9, which is intended for different purpose. Further, if at this stage, Advocate Commissioner files a report, as directed by Appellate Court with the assistance of the Mandal Surveyor it would certainly amount to introducing additional evidence which is ordinarily not permissible unless proper application is made under Order XLI Rule 27 satisfying the conditions therein. No such conditions were pleaded in the affidavit accompanying I.A.No.87 of 2004 and therefore it was improper for the learned Appellate Judge to appoint Advocate Commissioner. This would certainly amount to improper exercise of jurisdiction and misdirection in law which would occasion failure of justice. Therefore, this Court is amply justified in interfering in this case nullifying orders of the learned Senior Civil Judge, Sompeta.”

In the considered opinion of this Court, the principle laid down in the above-referred judgment, is squarely applicable to the facts and circumstances of the present case. In the affidavit filed in support of the present application in I.A.No.315 of 2014, absolutely there is no plausible explanation forthcoming from the respondents as to why an application under Order XXVI Rule 9 of the Code was not filed before the trial Court during the pendency of the suit. It is also important to note at this juncture that as per the submission of the learned counsel for the petitioners, the appeal is at advanced stage i.e. at the stage of arguments. In the definite opinion of this Court, unless strong case is made out by the respondents herein, the appointment of Commissioner at this stage cannot be justified. The facts and circumstances of the present case drive this Court towards an irresistible conclusion that the order passed by the Court below does suffer from jurisdictional infirmity which warrants interference of this Court under Article 227 of the Constitution of India, as such, this Court has absolutely no scintilla of hesitation nor any traces of doubt to hold that the order under challenge is not sustainable.

For the aforesaid reasons and having regard to the judgment referred to above, the civil revision petition is allowed, setting aside the order dated 02.09.2014 passed in I.A.No.315 of 2014 in A.S.No.52 of 2010 by the I Additional District Judge, Karimnagar.

As a sequel, miscellaneous petitions, if any, pending in this civil revision petition shall stand closed.

---

**JUSTICE A.V. SSHA**

**SAI**

18<sup>th</sup> February, 2015

IBL

---

[\[1\]](#) 2005 (2) ALD 130